80-1646

No. 80-

Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL MOTORS CORPORATION,
Petitioner,

v.

DIRECTOR OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the National Institute for Occupational Safety and Health may compel an employer to produce complete and individually identifiable medical records and histories of employees who refuse to consent to such disclosure, consistent with the constitutional right of privacy of those employees:

(1) where the information in the records and histories was given to the employer's medical personnel in confidence with the expectation that confidentiality would be preserved,

(2) where, in addition to NIOSH, third-party contractors with NIOSH would have access to the information, and

(3) where such disclosure would gratuitously intrude on the rights and privileges of the employees under state and federal law, which also protects the confidentiality of the information.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, General Motors Corporation,[1] prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case, entered on December 30, 1980.

[1] Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of petitioner General Motors Corporation: Colmotores, Bogota, Columbia; General Motors Iran Limited, Tehran, Iran; Isuzu Motors Limited, Tokyo, Japan; GM Allison Japan Limited, Tokyo, Japan; General Motors Kenya Limited, Nairobi, Kenya; Saehan Motor Company, Ltd., Seoul, Korea; General Motors Pilipinas, Inc., Manila, Philippines; Saudi American Machinery Maintenance Company, Ltd., Jeddah, Saudi Arabia; and Industria Delova Automobile, Kikinda, Yugoslavia.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 636 F.2d 163, is set forth as Appendix A, *infra*, pp. 1a-6a. The opinion of the District Court for the Southern District of Ohio, reported at 459 F. Supp. 235, is set forth as Appendix B, *infra*, pp. 7a-15a.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 30, 1980 and is set forth as Appendix C, *infra*, p. 17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Also involved are Sections 8(b), 20(a)(6), 20(b) and 20(e) of the Occupational Safety and Health Act, 29 U.S.C. §§ 657(b), 669(a)(6), 669(b) and 669(e) (1976), and portions of Section 3 of the Privacy Act of 1974, 5 U.S.C. §§ 552a(a)(3) and 552a(e)(1) (1976). These statutory provisions are set forth in full at Appendix D, *infra*, pp. 19a-21a.[2]

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[2] For the convenience of the Court, petitioner has also set forth in Appendix D, p. 21a, the Ohio physician-patient privilege statute, Ohio Rev. Code § 2317.02(B).

STATEMENT OF THE CASE

The essential facts before the Court of Appeals and the District Court are not in dispute and may be summarized as follows:[3]

On November 1, 1976, the National Institute for Occupational Safety and Health ("NIOSH") received a written request from a union representative to perform a Health Hazard Evaluation ("HHE") at a plant operated by the Inland Division of petitioner General Motors Corporation ("General Motors") in Dayton, Ohio. (459 F. Supp. at 237, App. B at 8a; C.A. App. at 107).[4] The HHE concerned an industrial process known as the "wet rubber process." (459 F. Supp. at 237, App. B at 8a). In conducting the HHE, NIOSH asked that Inland make available for examination and copying the medical records of all employees who were working or who formerly had worked with the wet rubber process. (459 F. Supp. at 237, App. B at 9a).

General Motors' Inland Division maintains medical records documenting employee medical histories and employee examinations and treatment by the Division Medical Department. These records are kept in confidence and are placed in locked files accessible only to the physician who is Division Director of Health and Safety and to the

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[3] Citations to the record below are to the Appendix before the Court of Appeals, cited as "C.A. App. at ."

[4] Health Hazard Evaluations are conducted by NIOSH pursuant to its authority under Sections 20(a)(6) and 20(e) of the Occupational Safety and Health Act (the "OSH Act"), 29 U.S.C. §§ 669(a)(6) and 669(e) (1976), App. D at 19a-20a, to determine, upon request by an employer or an authorized representative of employees, "whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found . . . ."

nurses working with him. (C.A. App. at 55-57).[5] The District Court found that this information was extensive and contained confidential information about the employees. (459 F. Supp. at 237, App. B at 9a). For example:

> Under the section, "Medical History", are questions such as: "Have you had or consulted a physician for any of the following: . . . venereal disease . . . emotional disorder, nervous breakdown . . . ." There are also the following questions for which answers are requested: "Do you drink alcoholic beverages? How much? How frequent? Have you ever had a health problem caused by drinking? Do you, or have you taken 'street drugs? Heroin, cocaine, LSD, uppers or downers'?" (*Id.*)

In response to the NIOSH request, the Health Director agreed to make each such record available upon obtaining the consent of the individual employee. (*Id.*) Of the 704 employees and ex-employees who were sent consent forms by General Motors, 66 could not be located, 148 consented, and 490 employees refused to consent to the release of their medical records. (*Id.*)

Consistent with general NIOSH practice, the medical records of the employees, if provided, would be kept in locked cabinets under reasonably secure conditions; there was no evidence of any breach of security as to HHE records. (459 F. Supp. at 237, App. B at 10a). However, this information is processed by a variety of technicians and clerks and is coded for computer access by a third-party contractor. (*Id;* C.A. App. at 96). Moreover, contract physicians who provide services to NIOSH in connection with HHEs "would be permitted to retain copies of notes and findings for a prolonged period of time and such information could be retained beyond the control of NIOSH on a permanent basis." (459 F. Supp. at 238, App. B at 10a).

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[5] Upon request, and when necessary for annual physical examinations, job placement or other reasons, supervisory personnel within General Motors may obtain access to employee medical information. (C.A. App. at 61-63).

On October 17, 1977, NIOSH served a subpoena *duces tecum* on General Motors to compel disclosure of the medical records of all 704 employees who worked with the wet rubber process. (C.A. App. at 2, 109). On October 19, 1977, General Motors brought suit in District Court for a declaratory judgment that it was not obligated to respond to the subpoena. (C.A. App. at 1-31).[6]

The District Court held (1) that, irrespective of whether the employees had consented to disclosure, General Motors was required to produce the subpoenaed medical records, but with personal identifying information deleted; (2) that General Motors was not required to disclose to NIOSH "identified" medical records, save those pertaining to employees who consented to the disclosure;[7] and (3) that a non-consenting employee would be entitled to a due process hearing before his identified records could be examined by NIOSH. (459 F. Supp. at 239-40, App. B at 14a-15a).[8]

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[6] In the complaint, jurisdiction was predicated on 28 U.S.C. § 1346(a)(2) (1976) and the Constitution. The District Court had jurisdiction also under 28 U.S.C. § 1331(a) (1976).

[7] NIOSH has conceded that if names and addresses are to be deleted, deletion of all personal identifiers (such as social security numbers) would not be contested. NIOSH Br. on Appeal, p. 47 at n.14.

[8] Two months prior to the decision of the Sixth Circuit, the Court of Appeals for the Third Circuit held on similar facts that such an opportunity to be heard after notice is constitutionally required. *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980), discussed at pp. 7-9, *infra.*

Although the Third Circuit decision was specifically called to the attention of the Sixth Circuit following oral argument, that court made no mention of it in its opinion, citing instead to the *Westinghouse* District Court decision, 483 F. Supp. 1265 (W.D. Pa. 1980), which had called for full enforcement of the subpoena without provision for notice or hearing. (636 F.2d at 166, App. A at 5a).

On appeal by NIOSH and cross appeal by General Motors, the Sixth Circuit rejected the remedy adopted by the District Court and held that NIOSH could compel production of complete employee medical information and that neither deletion of names and addresses nor the granting of a hearing to non-consenting employees was required. The Court of Appeals concluded that "proper security administration" of the information by NIOSH would allow completion of the HHE "without jeopardizing the constitutional rights of the individuals involved." (636 F.2d at 166, App. A at 4a). The Sixth Circuit relied upon (1) the decision of this Court in *Whalen v. Roe*, 429 U.S. 589 (1977), upholding a state statutory program requiring that the names of patients receiving certain prescription drugs be reported to the state and (2) three district court opinions upholding HHE subpoenas for employee medical information. (636 F.2d at 166, App. A at 5a).[9]

The protection of the privacy rights of the affected employees ordered by the District Court is the minimum required by the United States Constitution. The Sixth Circuit's refusal to endorse any measure of pre-disclosure protection not only directly conflicts with a decision of the Third Circuit but also decides an important federal issue which, for reasons hereafter stated, calls for invocation of this Court's certiorari power.

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[9] *United States v. Allis-Chalmers Corp.*, 498 F. Supp. 1027 (E.D. Wis. 1980); *United States v. Westinghouse Electric Corp.*, 483 F. Supp. 1265 (W.D. Pa. 1980); and *E. I. du Pont de Nemours & Co. v. Finklea*, 442 F. Supp. 821 (S.D. W. Va. 1977). As noted, the Sixth Circuit made no mention of the Third Circuit's modification of the *Westinghouse* decision on appeal, 638 F.2d 570 (3d Cir. 1980).

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court Below Allowing NIOSH Unrestricted Access to the Employees' Complete Medical Records Conflicts With the Decision of the Third Circuit in *United States v. Westinghouse Electric Corp.* on the Same Issue.

The Sixth Circuit's decision is in direct conflict with the decision handed down several months earlier by the United States Court of Appeals for the Third Circuit in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980).

As in this case, at issue in *Westinghouse* was enforcement of a subpoena *duces tecum*, issued by NIOSH in the course of conducting an HHE, which sought access to employee medical records. The Third Circuit held that the affected employees' interests in maintaining the privacy of their medical records were entitled to constitutional protection, 638 F.2d at 577, and that NIOSH did not have *carte blanche* to compel the production of medical records of objecting employees. In contrast to the decision of the Court of Appeals here, the Third Circuit adopted a procedure requiring NIOSH "to give prior notice to the employees whose medical records it seeks to examine and to permit the employees to raise a personal claim of privacy, if they desire." 638 F.2d at 581. In the event an employee raised such a claim, the District Court was to balance the competing interests and decide whether or not it should be upheld. 638 F.2d at 581-82.

Central to the analysis employed by both the *Westinghouse* court and the court below is *Whalen v. Roe*, 429 U.S. 589 (1977). This Court was confronted in *Whalen* with claims by patients using certain prescription drugs that a

New York statute requiring dispensing pharmacists[10] to report the patients' identities to the state health department invaded constitutionally protected privacy rights. The Court held that, given the New York law's safeguards against further disclosure of the information, the reporting requirement was not an impermissible invasion of the prescription drug users' privacy.

In *Westinghouse*, the Third Circuit found that the medical information subpoenaed by NIOSH was "more extensive than the mere fact of prescription drug usage by identified patients considered in *Whalen v. Roe* and may be more revealing of intimate details." 638 F.2d at 577. The Court of Appeals recognized that:

> Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life."[11]

Accordingly, the Third Circuit held the information to be within one of the constitutionally protected zones of privacy and ruled that before disclosure could be ordered, the competing interests for and against intruding upon that privacy had to be balanced carefully, taking into account the following factors:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent

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[10] N.Y. Pub. Health Law § 3333(4). If the drug is not only prescribed but also dispensed by the physician, the reporting obligation is imposed on the physician. *Id.* at § 3331(6).

[11] 638 F.2d at 577, quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting) (footnote omitted), *rev'd*, 353 U.S. 391 (1957).

> unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

638 F.2d at 578.

As a result of this balancing of interests, the Third Circuit held that while the general privacy rights of the Westinghouse employees did not justify withholding the information in its entirety, the same could not be said as to the privacy rights of individual employees. Recognizing that in individual instances an employee's privacy interests might well outweigh the interests of NIOSH in obtaining his complete medical file, the *Westinghouse* court held that all affected employees are entitled to notice and that those who object have a right to be heard prior to any such disclosure. 638 F.2d at 580-82.[12]

By contrast, the Court of Appeals in this case engaged in no such delicate balancing. Instead, the Sixth Circuit concluded that the result in *Whalen* was dispositive of the privacy claim advanced on behalf of the General Motors employees. The Court broadly construed *Whalen* as resolving the "potential conflicts between a public agency's statutory right of access to individuals' medical records and the patients' constitutional privacy interests." Ignoring the sensitive nature of the information in the employees' medical files, the Sixth Circuit held that their privacy interests

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[12] In so holding, the court relied in part on the decision of the District Court in this case, which held that "it would seem that individual rights of a person should not be taken from him without his knowledge and without an opportunity to be heard." 459 F. Supp. at 239, App. B at 13a. As the Third Circuit put it, "each employee is entitled to make an individual judgment as to whether s/he regards the information so sensitive that it outweighs that employee's interest in assisting NIOSH in a health hazard investigation that may benefit the employee." 638 F.2d at 581.

necessarily must yield, so long as post-disclosure precautions by means of protective order are taken to maintain the security of the personally identifiable records. Under the Sixth Circuit rule, employees will have no right to pre-disclosure notice[13] or hearing.[14] 636 F.2d at 166, App. A at 5a-6a.

The court below thus read *Whalen* as a blanket endorsement of the constitutionality of compulsory disclosure of complete medical files, provided adequate measures were employed to prevent *further* disclosure of the records. The Third Circuit, on the other hand, recognized that this Court's approval of the comparatively minor privacy intrusion worked by the New York law could not be equated with the disclosure of an employee's entire medical file, and laid down protective steps with which NIOSH must comply *prior* to disclosure.

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[13] While notice might, and no doubt often would, be provided voluntarily by the employer, such notice is of little value if the employee has no right to a hearing at which he can voice objections.

[14] In this respect, the Sixth Circuit's decision also clashes with well-established principles of procedural due process. As this Court observed in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)):

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."

The thread running through decisions such as *Fuentes* is that where a person's "liberty" or "property" interests are affected, the due process clause of the Fourteenth Amendment requires that the state provide notice and an opportunity to be heard. Surely no less is required of the federal government under the identical clause of the Fifth Amendment, when the employees' privacy rights are impaired by disclosure of personally identified medical records.

The conflict between the decision of the court below and that of the Third Circuit in *Westinghouse* is not an academic one, but one that will have a substantial and detrimental impact on the HHE program for all concerned.

Employers such as General Motors, with plants situated throughout the United States, will particularly be prejudiced. Such employers will be compelled to establish different administrative procedures to respond to requests for medical records, depending upon whether the facility is located in the Third or Sixth Circuit. In the Sixth Circuit, an employer will be powerless to shield confidential medical information from disclosure, which will adversely affect the ability of the employer to provide necessary medical services to its employees. Where the government has unrestricted access to employees' entire medical records, employees may no longer be candid with employer physicians, withholding the very information necessary for the physicians to diagnose and treat employee medical problems.[15] Even greater confusion will reign in other locations, since no controlling rule will have been established. To resolve the matter, further litigation will inevitably result and further fragmentation is predictable.

From the employees' perspective, the conflict between the decision of the court below and the *Westinghouse* decision will produce even more unjust results. Those who work within the geographic jurisdiction of the Third Circuit will, fortuitously, be given prior notice and an oppor-

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[15] If there were any question as to General Motors' standing to maintain this action, and there has been no such question raised by NIOSH throughout this litigation, the stake of General Motors in the integrity of its medical services to employees would be more than adequate to put the question to rest. In addition, the subpoena was directed to General Motors. The *Westinghouse* court relied on these grounds in expressly holding that the employer had standing to defend the privacy rights of its employees. 638 F.2d at 573-74.

tunity to object to the intrusion upon their privacy that would result from disclosure of their medical records to NIOSH. Employees in the Sixth Circuit will be deprived of these rights of prior notice and hearing, and the rights of employees in the nine other circuits will remain uncertain.

Disparate impacts such as these are undesirable in a federal program such as the Health Hazard Evaluation program which is national in scope and should be even-handed in application. This Court should grant the petition for writ of certiorari and announce a rule of uniform application, thereby resolving the conflict between the Sixth and Third Circuits and ending the inappropriate uncertainty in impact of the federal HHE program depending on location of the plant under evaluation.

II

The Court Below Has Decided an Important Issue of Federal Law Which Should Be Settled by This Court.

A. Review of the Decision Below Is Required to Strike a Definitive Balance Between the Substantial Federal Interests Which Confront One Another in This Case — the Right of NIOSH to Carry Out Its Statutory Mandate and the Constitutional Right of Affected Employees to Maintain the Privacy of their Medical Records.

Wholly apart from the conflict with the Third Circuit's decision in *Westinghouse*, the decision of the Court of Appeals in this case should be reviewed because the issue determined raises important questions of federal law.

First and foremost is that which pits the federal government's information-gathering power against the con-

stitutional right of its citizens to maintain the privacy of the information sought.[16] Specifically, in this case, NIOSH seeks to compel General Motors to disclose individually identifiable and complete medical records and histories of 490 of its employees who have refused to consent to the disclosure. Does not the employees' constitutional right of privacy preclude, at a minimum, the disclosure of personal identifiers, where the records and histories contain private medical information which was given by the employees with the expectation that its confidentiality would be maintained by the General Motors' medical personnel to whom given and where disclosure would render this information accessible not only to NIOSH, but also to third parties having a contractual relation with NIOSH?

Although existing decisions of this Court do not provide the answer to this question, the Sixth Circuit result is inconsistent with the ground rules which have been drawn by the Court concerning disclosure of sensitive personal information.

In determining whether members of the public could by FOIA request obtain summaries of cadet disciplinary

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[16] Previous decisions of this Court make clear that the right of privacy is one of the due process "liberties" protected by the Constitution. *Roe v. Wade*, 410 U.S. 113, 152 (1973), held that although the right of privacy is not explicitly mentioned in the Constitution, "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." The Court's subsequent opinions have delineated a set of as yet incomplete boundaries within which individual privacy will be protected from both public and governmental intrusion. *E.g., Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-85 (1977) (minors' right of access to contraceptives); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978) (right to marry). Although the Court has not yet indicated what the "outer limits" of the right may be, *Carey*, 431 U.S. at 684-85, the decisions firmly establish its fundamental nature.

proceedings collected in the first instance by a service academy, this Court approved the judicial screening of the documents ordered by the court below and stressed the importance of redaction of the records, by deletion of personal identifiers, in preserving the privacy of the individuals involved. *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). In *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Court rejected the disclosure demand of a non-government entity (a union asserting that the refusal to disclose with personal identifiers intact was an unfair labor practice) for psychological testing records of employees collected in the first instance by an employer for use in making job placement decisions. In a third context, this Court has held that a state, as a part of its drug-abuse control program, may constitutionally require disclosure of the identity of patients for whom drugs with a potential for abuse have been lawfully prescribed, so long as the post-disclosure safeguards against dissemination beyond the limited number of state employees administering the program were adequate. *Whalen v. Roe*, 429 U.S. 589 (1977).

The Sixth Circuit, without regard to the principles set forth in *Rose* and *Detroit Edison*, found *Whalen* dispositive. *Whalen*, however, did not involve invasion of an individual's constitutional right of privacy by a federal agency's compelled production of complete medical records and histories; nor in *Whalen* was the disclosure to the government agency inconsistent with any reasonable expectation of privacy in the information provided; nor in *Whalen* did disclosure of the information extend to non-governmental third parties having access to the information pursuant to contract with the agency. Finally, the information required to be disclosed in *Whalen* was limited in scope and the inclusion of personal identity

was directly related to one or more of the ends sought to be accomplished by the statutory program in question.

Given these significant distinctions between *Whalen* and the case at bar, if the rule in *Whalen* were indeed controlling here, as the Sixth Circuit has held, this case would represent a substantial additional incursion into the privacy rights of those interested in maintaining the confidentiality of their personal medical records. At the very least, such a step ought not be taken without this Court first having an opportunity to determine whether *Whalen* will bear this added burden.

Not only was the invasion of privacy held permissible in *Whalen* quite limited in scope, but the very substance of the information disclosed – the identity of persons lawfully receiving certain drugs pursuant to prescription – sits at best at the periphery of those personal details the disclosure of which the average person would find objectionable and with which the right of privacy is concerned. In contrast, it is difficult to imagine matters closer to the core of the privacy right than records revealing one's complete medical history.

Moreover, the information disclosed in *Whalen* was required to be kept for the very purpose of disclosure to the appropriate state authorities. There could thus be no reasonable expectation that the identity of purchasers of certain prescription drugs – information not properly characterized as confidential in the first instance[17] – would be held in confidence. The "legitimate expectation of privacy," *Nixon v. Administrator of General Services,* 433 U.S. 425, 458, 465 (1977); *cf. Katz v. United States,* 389 U.S. 347,

[17] The New York Controlled Substances Act specifically provides that, with regard to duties arising under the act, "no communication made to a practitioner shall be deemed confidential" within the meaning of the New York physician-patient privilege. N.Y. Pub. Health Law § 3373.

353 (1967), which was absent in *Whalen* is present in the case at bar. The OSH Act does not mandate that General Motors maintain the complete medical files sought by NIOSH. Indeed, much of the information in those files antedates the existence of NIOSH and the Act. As a result, the employees in this case had every reasonable expectation that the confidentiality of sensitive medical information given in confidence would be maintained.[18]

These are not distinctions without a difference; the fact that in this case, of the 638 General Motors employees to whom consent forms were given, 490 objected to disclosure of their medical files, underscores this difference.

The combination of factors distinguishing this case from *Whalen* casts serious doubt on the adequacy of an approach which looks only to the effectiveness of the provisions made for governmental safekeeping of the information, *after* disclosure to the agency has been made. As the Court recently noted in a related context, such restrictions are only as effective as the sanctions available to enforce them, and they can do nothing to prevent "the danger of inadvertent leaks." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315-316 (1979). Where the privacy interests relate to an individual's complete medical records, such interests, qualitatively and quantitatively, are deserving of protection *prior* to disclosure by means of redaction, so long as the elimination of identifiers would not unduly impair the agency's ability to carry out its program.[19]

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[18] The fact that contracting third parties will have access to the information once it is disclosed to NIOSH is yet another mirror-image contrast with *Whalen*, where *post*-disclosure access was limited to the agency, but where access by third parties (pharmacists) was typical *prior* to disclosure to the agency.

[19] As will be demonstrated in the next section, the inclusion of personal identifiers is neither essential nor directly related to the goals of the HHE program. See pp. 21-22, *infra*.

Thus, there are substantial reasons why the proper balance between agency information-gathering powers and the privacy interests invaded by disclosure of the sensitive data contained in an individual's entire medical file should not be controlled by *Whalen*, followed unquestioningly by the Sixth Circuit here. Granting review in this case will provide the Court with an opportunity to consider those reasons and to announce a definitive rule reflective of that balance.

B. Review of the Decision Below Is Required to Ensure That the Controlling Federal Rule Does Not Gratuitously Impair State-Created Rights.

There is yet another reason why the decision of the Sixth Circuit ought to be reviewed by this Court. The Court of Appeals flatly rejected the argument premised upon the physician-patient privilege enjoyed by the employees under Ohio statutory law.[20] Without challenging the District Court's explicit finding that "the information requested is extensive and would qualify by any standard as confidential medical information subject to doctor/patient privilege," 459 F. Supp. at 237, App. B at 9a, the Sixth Circuit noted that such a privilege is not recognized at common law, nor has it been codified by federal statute. Thus, the Court of Appeals concluded that to base its decision upon the doctor-patient relationship would "in effect, expand the scope of the 'federal common law,'" which it expressly declined to do. 636 F.2d at 165, App. A at 3a-4a.

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[20] Ohio Rev. Code § 2317.02(B), App. D at 21a. Under Ohio law, the privilege applies when the physician is a plant physician and the patient an employee. *Malone v. Industrial Comm'n*, 140 Ohio St. 292, 304, 43 N.E.2d 266, 272 (1942).

It is petitioner's position that proper resolution of the interplay between the NIOSH demand for disclosure and the Ohio physician-patient privilege is not so simple.

Given the federal nature of our system of government and the Supremacy Clause of the Constitution, federal law will of course override otherwise applicable state law where necessary to attain the ends sought by federal law. An equally fundamental and important part of this system, however, is that the very dominance of federal law calls for a sensitivity and care in its application so as not to interfere needlessly with the applicability of state law. For example, in *Lora v. Board of Education*, 74 F.R.D. 565, 576 (E.D.N.Y. 1977), a federal question case in which neither right of privacy interests nor state law of privilege was held sufficient to block compelled disclosure of randomly selected and *anonymous* psychiatric files, the court nevertheless recognized that:

> "[A] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976); *cf. Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975). If the state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.

Similarly, in *Herman Brothers Pet Supply, Inc. v. NLRB*, 360 F.2d 176 (6th Cir. 1966), the court affirmed the quashing of an NLRB subpoena *duces tecum* in light of a state statute protecting the confidentiality of the records subpoenaed.

This federal policy of deference to the law of the states has been articulated by this Court many times, but has

perhaps nowhere been better expressed than in *Younger v. Harris*, 401 U.S. 37, 44 (1971):

> What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

More recently the Court stated in a similar vein in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973) (California statute giving right of action for wages despite agreement to arbitrate held not preempted by New York Stock Exchange rule, promulgated under the Securities & Exchange Act, providing that such disputes be arbitrated):

> [W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."

Congress has also shown its sensitivity to these considerations of comity. In enacting the Federal Rules of Evidence, Congress provided, in lieu of a uniform federal rule, that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a . . . person . . . shall be determined in accordance with State law." Rule 501. The rationale underlying this provision was described in the Report of the Senate Judiciary Committee, S. Rep. No. 93-1277, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S.

Code Cong. & Ad. News 7051, 7053: "Federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason."

The OSH Act and its legislative history provide no indication that Congress intended to negate state privilege law. *See* 29 U.S.C. §§ 657(b) and 669(b) (1976), App. D at 19a-20a; S. Rep. No. 91- 1282, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5177. Accordingly, the federalism concerns above stated are relevant in this case to a determination of the extent to which the confidentiality inherent in the physician-patient privilege[21] recognized by Ohio law ought to be accommodated in the operation of the NIOSH statutory scheme. The granting of the writ will enable the Court, in contrast to the all-or-nothing approach taken by the Sixth Circuit below, to make the sensitive judgments called for by its prior decisions in this area.[22]

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[21] As the Court observed last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980):

> The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. . . . [T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

[22] The considerations of comity called for here were, of course, not present in *Whalen*, where it was the *state* which required disclosure of the limited prescription information there at issue and at the same time specifically provided that its physician-patient privilege was inapplicable to such information. N.Y. Pub. Health Law § 3373. Indeed, the fact that the disclosure was called for by a state as a part of its program of control of drug abuse militated *against* interference by the federal judiciary with such social experimentation in the state's own "laboratory." *Whalen*, 429 U.S. at 597 & n.20.

In *DeCanas v. Bica*, 424 U.S. 351, 357-58 n.5 (1976), this Court reiterated the principle set forth in *Merrill Lynch* which should be applicable here as well – absent repealing or exclusivity provisions, state law which conflicts with federal law " 'should be preempted . . . "only to the extent necessary to protect the achievement of the aims of" ' the federal law . . . ." The goal of the NIOSH program is the non-individualized evaluation of the existence of health hazards at particular plants or parts thereof.[23] The Sixth Circuit concluded that NIOSH could not perform its statutory duty without individual identification because:

> It would be *impossible* for the Institute's investigators to follow up and confirm or refute suspected cases of occupational skin disease revealed in their study of medical records which were anonymous.[24]

It is submitted that the reasoning of the Sixth Circuit is flawed on this point. Impossibility of follow-up would result from working with medical records having personal identifiers removed *only if* there were no means by which to couple the anonymous record with the employee whose record it is.

It is surely apparent that there are numerous ways – whether by code or key number maintained by the employer's medical director, or other similar means – whereby follow-up could be accomplished without disturbing the anonymity of medical records in the hands of

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[23] *See* 29 U.S.C. § 669(a)(6) (1976), App. D at 19a-20a. In this respect, the case at bar is also distinguishable from *Whalen*, where one of the uses of having the patients' names was to be able to detect and investigate subsequent specific cases of possible drug misuse.

[24] 636 F.3d at 165, App. A at 4a (emphasis added).

NIOSH. This would give NIOSH access to further information in those instances where necessary;[25] at the same time, without adopting the physician-patient privilege as a matter of federal common law, such a procedure would respect the interest of confidentiality represented by state law, the obligations of NIOSH under federal law, and the federal constitutional right of privacy.

CONCLUSION

A writ of certiorari should be granted in this case to decide the important federal question whether the Constitution requires that pre-disclosure protections be imposed upon federal agency demands for entire medical files, and if so, what those protections should be. The Third and Sixth Circuits are in conflict as to whether any limitations prior to disclosure are required. A definitive resolution of this issue, which gives appropriate weight to the extent to which it is necessary that the agency have the information, and to the extent to which the constitutional right of privacy and principles of federalism can and should accommodate the interests of employees and employers in maintaining the confidentiality of the information, is needed.

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[25] NIOSH is obligated by the Privacy Act of 1974, 5 U.S.C. § 552a(e)(1) (1976), to:

> [M]aintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.

The Privacy Act defines the term "maintain" to include "maintain, collect, use, or disseminate." 5 U.S.C. § 552a(a)(3) (1976), App. D at 21a.

For these reasons and all those stated above, the writ should issue.

Respectfully submitted,

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March 30, 1981

Appendix A

Nos. 79-3168
79-3169

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GENERAL MOTORS CORPORATION,
Plaintiff-Appellee,
Cross-Appellant,
v.
DIRECTOR OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Defendant-Appellant,
Cross-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed December 30, 1980.

Before: ENGEL, MARTIN, and JONES, Circuit Judges.

MARTIN, Circuit Judge. This appeal concerns the enforceability of a subpoena duces tecum issued pursuant to 29 U.S.C. § 657(b) by the National Institute for Occupational Safety and Health (the Institute) against General Motors Corporation. Both parties appeal from a District Court order granting partial enforcement of the subpoena.

The Institute was created to effectuate the research policy of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651(b)(5), (6), (7), and 671. In 1976, at the request of the union representing employees at General Motors' Dayton, Ohio, Inland Division, the

Institute undertook a "health hazard evaluation" at the facility known as the "Hill Plant." The purpose of this inquiry was to determine the cause of certain skin diseases incident among workers in the "wet rubber process."

On October 17, 1977, in the course of gathering information for its study, the Institute issued a subpoena duces tecum directing General Motors to produce the medical records of all "wet rubber process" employees. These records are on file in the office of the plant physician and are normally accessible only to members of the company's medical staff. General Motors took the position that it would comply with the subpoena only if individual employees signed a form authorizing release of their records. The company distributed consent forms to 704 workers; of this number, 490 failed to execute the release. These 490 medical files are the subject of the present controversy.

On October 19, 1977, General Motors petitioned the District Court for a declaratory judgment relieving the company of any duty to divulge the contents of the 490 records. In a memorandum opinion reported at 459 F.Supp. 235 (S.D. Ohio 1978), the District Court ordered General Motors to produce the subpoenaed material but authorized the deletion of individual employees' names and addresses from the files.

On appeal, the Institute points out that for purposes of a health hazard evaluation, medical histories of identifiable employees are significantly more helpful than anonymous records; it contends that the District Court erred in permitting the company to withhold this information.

General Motors, on the other hand, raises the following arguments: first, that the Institute has no statutory authority to issue subpoenas at all; second, that the compulsory disclosure of these records infringes both the em-

ployees' constitutional privacy rights and the privilege that exists between physician and patient under Ohio law.

General Motors appears to concede that the Institute is seeking information relevant to a lawful investigation. 29 U.S.C. §§ 669, 671; *United States* v. *McGee Industries, Inc.*, 439 F.Supp. 296, (E.D. Pa. 1977), *aff'd without opinion*, 568 F.2d 771 (3rd Cir. 1978). It denies, however, that the Institute is empowered to obtain data for its analysis by means of a subpoena. We disagree. The Institute's authority is coextensive with that of the Secretary of Health, Education and Welfare. 29 U.S.C. § 671(c)(2). 29 U.S.C. § 669(b) empowers the Secretary of Health, Education and Welfare, and therefore the Institute as well, to conduct investigations in the manner prescribed by Section 657 of the statute. That section provides, in pertinent part:

> In making his inspections and investigations under this chapter the Secretary (of Labor) may require the attendance and testimony of witnesses and the production of evidence under oath . . . .

We are satisfied that Congress, by reference back to preceding sections of the statute, intended to confer subpoena power on the Institute. General Motors' contention that the District Court erroneously "implied" this power is without merit.

We turn now to the central issue in this controversy — whether the Institute can obtain, in individually identifiable form, the medical records of the 490 General Motors employees who did not execute releases. General Motors raises two objections to disclosure. First, it argues, full enforcement of the subpoena would be inconsistent with Ohio Rev. Code §§ 2317.02 and 4731.22, enacted to protect the confidentiality of physician-patient communications.

We reject this analysis by noting that the Ohio privilege statute is not the controlling principle of law here.

This case presents a federal question; the applicability of a privilege must, accordingly, be ascertained by reference to federal statutes and the common law. *Heathman* v. *United States District Court*, 503 F.2d 1032 (9th Cir. 1974). The common law did not recognize a physician-patient privilege at all. *Whalen* v. *Roe*, 429 U.S. 589 at 602, n. 28 (1977). Neither has Congress codified the concept in a federal statute. A decision in this case based on considerations of the physician-patient relationship would, in effect, expand the scope of the "federal common law." This we decline to do.

General Motors predicates its second argument against full enforcement of the subpoena upon its employees' right to privacy. The production of identifiable medical records would, according to the company, infringe upon the "zone" of privacy interests protected by the Constitution.

In particular, General Motors has expressed concern that the retention of names and addresses in the subpoenaed material might lead to the "exposure" of information which employees revealed to the plant physician in the expectation that it would remain strictly confidential. On the other hand, in the absence of individual identification, the Institute's performance of its statutory duties would be hampered. It would be impossible for the Institute's investigators to follow up and confirm or refute suspected cases of occupational skin disease revealed in their study of medical records which were anonymous.

We do not believe that the parties' interests in this case are mutually exclusive. With proper security administration, the Institute should be able to complete the comprehensive health hazard evaluation requested by the employees' Union without jeopardizing the constitutional rights of the individuals involved.

In *Whalen* v. *Roe, supra,* the Supreme Court examined the potential conflicts between a public agency's statutory right of access to individuals' medical records and the patients' constitutional privacy interests. Satisfied that adequate provision has been made to prevent dissemination of personal information beyond the agency's records, the Court upheld a New York statute requiring physicians to report to the Health Department the names of patients receiving dangerous but legitimate drugs such as methadone and amphetamines. On the issue of governmental intrusion into health matters of a highly personal nature, the Court concluded:

> [D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissable invasion of privacy.

(Footnote omitted). *Id.* at 602. The Court did, however, explicitly reserve judgment on administrative schemes which comprise less comprehensive security measures against unwarranted disclosure than those practiced by the New York Health Department. *Id.* at 605.

The *Whalen* decision persuades us the Institute is entitled to enforcement of its subpoena duces tecum.[1] As the Institute states in its brief, *United States* v. *McGee Industries, Inc., supra,* adopts the proposition that the District

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[1]Three United States District Courts have reached the same result in cases very similar to this one. *United States* v. *Allis-Chalmers Corporation,* 498 F.Supp. 1027 (E.D. Wis. 1980); *United States* v. *Westinghouse Electric Corporation,* 483 F.Supp. 1265 (W.D. Pa. 1980); *E. I. DuPont de Nemours and Co.* v. *Finklea,* 442 F.Supp. 821 (S.D. W.Va. 1977).

Court may, in fact, fashion protective orders when enforcing an Institute subpoena duces tecum as a means of safeguarding against the improper disclosure of confidential business information. The brief of the Institute further assures us that under the contract there will be no public disclosure of the medical information pertaining to individual General Motors employees. With this in mind, we remand the case to the District Court for formulation and implementation of security provisions that will ensure proper disposition of the subpoenaed records as outlined in this opinion.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GENERAL MOTORS CORPORATION,

Petitioner,

v.

DIRECTOR OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH,

Respondent.

Civil Action No. C-3-77-339

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

This matter is before the Court following trial and the presentation of evidence and testimony. Plaintiff General Motors Corporation seeks a declaratory judgment relieving it from complying with a subpoena duces tecum issued by defendant directing such plaintiff to make disclosure of medical records of its employees. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its Findings of Fact, Opinion and Conclusions of Law.

I

FINDINGS OF FACT

1. Pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, the National Institute for Occupational Safety and Health (NIOSH) is authorized

to investigate working conditions of American laborers. Upon specific request, it may conduct a health hazard evaluation (HHE) of specific working conditions in a specific plant.

2. Plaintiff General Motors Corporation prior to 1977 maintained in Dayton, Ohio, a facility known as "The Hill Plant", South Upland Avenue, Dayton, Ohio. Among the industrial processes performed at such plant was one identified as "the wet rubber process".

On November 1, 1976, NIOSH received a written request to conduct a health hazard evaluation at the Hill Plant in regard to the wet rubber process. Such request was made pursuant to 29 U.S.C. § 669(a)(6) which provides in pertinent part as follows:

> [the Secretary of Health, Education and Welfare] shall determine, following a written request by any . . . authorized representative of employees . . . whether any substance normally found in the place of employment has potentially toxic effect in such concentration as used or found . . .

There is no dispute that NIOSH had appropriate authority to conduct the HHE regarding the wet rubber process. Notice was given on January 26, 1977, of an intent to conduct such HHE (Joint Exhibit II).

3. The Inland Division of General Motors maintains medical records of its employees. It employs a full time Director of Health and Safety and maintains first aid dispensaries at its various plants, including the Hill Plant. The plaintiff, through its Department of Health and Safety, conducts three types of examinations: A pre-employment physical; annual precautionary examinations of some employees; and those examinations required by the Occupational Safety and Health Act of 1970. Records of all

contact between employees and the medical facilities are maintained in the form of records of examination and records of treatments. Such records (Plaintiff's Exhibits 17, 18 & 19) contain confidential information. Under the section, "Medical History", are questions such as: "Have you had or consulted a physician for any of the following: . . . veneral disease . . . emotional disorder, nervous breakdown . . . ." There are also the following questions for which answers are requested: "Do you drink alcoholic beverages? How much? How frequent? Have you ever had a health problem caused by drinking? Do you, or have you taken 'street drugs? Heroin, cocaine, LSD, uppers or downers'?"

In addition to the foregoing, the information requested is extensive and would qualify by any standard as confidential medical information subject to doctor/patient privilege.

4. During 1977 employees of NIOSH visited the Hill Plant and requested an opportunity to examine and copy employee medical records. Dr. Merrill Gibson, Director of Health and Safety, Inland Division, agreed to make such records available with consent of the employees involved. On October 17, 1977, a letter was sent to employees with an attached release authorizing the plaintiff to turn over to such employee's personal physician any and all information contained in the employee's medical records (Plaintiff's Exhibits 9 and 10). Not all employees contacted executed the release. In most instances where the employee directed either that his medical records be transmitted to his personal physician or directly to NIOSH, such action was taken. Requests were sent to some 704 present or former employees. 148 gave consent; 490 refused; 66 were not located.

5. In October of 1977 representatives of NIOSH began an onsite health hazard evaluation and interviewed

certain of the employees. Approximately 120 employees were physically examined and an additional 40 answered questionnaires.

6. NIOSH maintains Health Hazard Evaluation records in locked cabinets and under reasonably secure conditions. Information obtained is handled by a variety of technicians and clerks and may become a part of computerized records which theoretically could be examined by anyone with access to such computer. Computerized records are not maintained on a name basis but rather upon a plant evaluation basis and information regarding a specific employee would be difficult, if not impossible, to retrieve. No evidence was presented of any breach of security.

Conflicting evidence was presented as to information obtained from such records by contract physicians who would conduct the study. At the very least, such physicians would be permitted to retain copies of notes and findings for a prolonged period of time and such information could be retained beyond the control of NIOSH on a permanent basis.

II

OPINION

A disposition of this matter requires a consideration of three issues:

A. Has NIOSH the statutory power to issue the subpoena duces tecum in question;

B. Does such subpoena duces tecum abuse the subpoena power;

C. Would compliance abridge the patient/physician relationship.

A. STATUTORY AUTHORITY

NIOSH contends that 29 U.S.C. § 671(c)(2) gives it subpoena power because that section incorporates by reference powers given to the Secretary of Health, Education and Welfare under 29 U.S.C. § 669,[1] which include the subpoena power conferred upon the Secretary of Labor by 29 U.S.C. § 657(b)[2]. General Motors concedes that NIOSH is empowered to do everything which the Secretary of Health, Education and Welfare may do under Section 669.[3] However, it denies those powers include subpoena power.

A subpoena duces tecum is not intended solely for enforcement purposes. It also may serve to provide statistical data which are needed for government reports, rulemaking and legislating. See *Bergman* v. *Senate Special Comm. on Aging*, 389 F. Supp. 1127 (S.D.N.Y. 1975). The subpoena in question was issued within the statutory authority of NIOSH.

B. ABUSE OF SUBPOENA POWER

At issue herein is only the question of a subpoena issued to General Motors. There is no question that NIOSH has the right to interrogate employees and while the question is not free from doubt, it is arguable that NIOSH

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[1] "The Institute [NIOSH] is authorized to . . . (2) perform all functions of the Secretary of Health, Education and Welfare under Section 669 . . . of this title." 29 U.S.C. § 671(c)(2).

[2] "In making his . . . investigations under this chapter the Secretary may require . . . the production of evidence under oath . . . ." 29 U.S.C. § 657(b).

[3] "The Secretary of Health, Education and Welfare . . . may prescribe regulations requiring employers . . . to make reports on the exposure of employees to substances or physical agents which the Secretary of Health, Education and Welfare reasonably believes may endanger the health or safety of employees." 29 U.S.C. § 669(a)(5).

could compel answers from employees themselves regarding their own health background. That issue, however, is not before the Court.

Bergman discusses an appropriate test for release of materials. The third prong of such test requires that "the materials sought [be] pertinent to the investigation", *supra* at 1130.

Bergman must be read in conjunction with *Watkins* v. *United States*, 354 U.S. 178 (1957) which held: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress", *supra* at 187.

The distinction, narrow though it may be, between substantive information for statistical purposes and identification of specific employees assumes a critical importance in terms of pertinence of this stage of the proceedings. If NIOSH is seeking only to accumulate statistical data regarding health conditions present in a group of employees who performed a certain process and not in others, it is clear that such information is pertinent, significant, and within its mandate of inquiry. Such information does not require the disclosure of identifying names or addresses. The Court is aware of no authority, and none has been cited, that statistical totals may not be made public or that an individual if unidentified has a right to be excluded from a scientific paper.[4]

While there is a limited exception to the foregoing under Ohio law, it does not seem to bear upon this question. Generally, an Ohio physician may not disclose a

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[4] In this connection the Court notes the testimony of defendant witness Dr. Stewart Brooks, who testified that at this stage of the investigation there was no need for the names of plaintiff's employees.

patient's medical records without the patient's consent, Ohio Rev. Code §§ 2317.02 and 4731.22; *Hammonds* v. *Aetna Casualty & Surety Co.*, 237 F. Supp. 96 (N.D. Ohio 1965). The purpose of this rule ". . . is to encourage patients to make a full disclosure of their symptoms and condition to their physicians without fear that such matters will later become public." *State* v. *Antill*, 197 N.E. 2d 548, 551 (S. Ct. Ohio 1964).

The limited exception may be found in Ohio Revised Code Section 3701.05. Whenever a physician diagnoses an occupational disease, he is required by this section to report to the Ohio Department of Health the

(a) Name, address, and occupation of [his] patient;

(b) [the] Name, address, and business of [the patient's] employer;

(c) [the] Nature of [the] disease; [and]

(d) Such other information as may be reasonably required by the department.

In such instances, the reporting physician has been held to enjoy an exemption from the nondisclosure rule. See *Antill, supra.*

We deal herein neither with an occupational "disease", nor with a Department of the State of Ohio. Expressio unius est exclusio alterius.

In the absence of some compelling need to identify individuals at this time by NIOSH, it would seem that individual rights of a person should not be taken from him without his knowledge and without an opportunity to be heard.

Insofar as plaintiff seeks a declaratory judgment relieving it of the duty to provide medical records to the

defendant, such request will be denied. Insofar as the prayer for such judgment would relieve plaintiff from supplying names and addresses to the records supplied, that prayer will be granted.

While the question need not be decided at this time, it would seem to this Court that should NIOSH subsequently require the names and addresses of specific employees for purposes of examination or questioning, the names and addresses themselves without reference to the specific records could be properly supplied to NIOSH and the matter thereupon resolved between NIOSH and the employees involved.

The right of subpoena and a compulsion to answer could thus be tested in an appropriate case and at an appropriate time with appropriate litigants given an opportunity to be heard.

In view of the foregoing, this Court makes the limited holding that plaintiff must supply medical records, but need not supply identifying names and addresses.

III

CONCLUSIONS OF LAW

A. This Court has jurisdiction pursuant to 28 U.S.C. § 1346(a)(2).

B. Defendant NIOSH is authorized to make inspections and to question employers and employees in order to carry out its functions and responsibilities. Pursuant thereto, an employer may be required to submit to NIOSH medical information regarding its employees without identification thereof.

C. An employer is not required to submit to NIOSH medical records identified by name and address without specific consent of the employee involved.

D. An employee is entitled to be heard in a due process hearing to determine whether or not identified records pertaining to him may be examined without his consent.

E. In view of the foregoing, judgment does hereby issue declaring that plaintiff shall make available to defendant medical records of its employees, but need not identify such records as to name or address of the employee involved.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/ CARL B. RUBIN
United States District Judge

Decided October 11, 1978.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 79-3168
79-3169

GENERAL MOTORS CORPORATION,

Plaintiff-Appellee,
Cross-Appellant,

v.

DIRECTOR OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Defendant-Appellant,
Cross-Appellee.

Before: ENGEL, MARTIN, and JONES, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby remanded for further proceedings.

No costs taxed.

ENTERED BY ORDER
OF THE COURT.
JOHN P. HEHMAN
Clerk

Entered December 30, 1980.

Appendix D

STATUTES INVOLVED

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

29 U.S.C. § 657. Inspections, investigations, and record-keeping

(b) Attendance and testimony of witnesses and production of evidence; enforcement of subpoena

In making his inspections and investigations under this chapter the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

29 U.S.C. § 669. Research and related activities

(a) Authority of Secretary of Health, Education, and Welfare to conduct research, experiments, and demonstrations, develop plans, establish criteria, promulgate regulations, authorize programs, and publish results and industrywide studies; consultations

(6) The Secretary of Health, Education, and Welfare shall publish within six months of December 29, 1970, and thereafter as needed but at least annually a list of all known toxic substances by generic family or other useful

grouping, and the concentrations at which such toxicity is known to occur. He shall determine following a written request by any employer or authorized representative of employees, specifying with reasonable particularity the grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found; and shall submit such determination both to employers and affected employees as soon as possible. If the Secretary of Health, Education, and Welfare determines that any substance is potentially toxic at the concentrations in which it is used or found in a place of employment, and such substance is not covered by an occupational safety or health standard promulgated under section 655 of this title, the Secretary of Health, Education, and Welfare shall immediately submit such determination to the Secretary, together with all pertinent criteria.

* * * * *

(b) Authority of Secretary of Health, Education, and Welfare to make inspections and question employers and employees

The Secretary of Health, Education, and Welfare is authorized to make inspections and question employers and employees as provided in section 657 of this title in order to carry out his functions and responsibilities under this section.

* * * * *

(e) Delegation of functions of Secretary of Health, Education, and Welfare to Director of National Institute for Occupational Safety and Health

The functions of the Secretary of Health, Education, and Welfare under this chapter shall, to the extent feasible, be delegated to the Director of the National Institute for Occupational Safety and Health established by section 671 of this title.

PRIVACY ACT OF 1974

5 U.S.C. § 552a. Records maintained on individuals

(a) **Definitions.** – For purposes of this section –

(3) the term 'maintain' includes maintain, collect, use, or disseminate;

* * * * *

(e) **Agency Requirements.** – Each agency that maintains a system of records shall –

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

OHIO REVISED CODE

§ 2317.02. Privileged communications and acts.

The following persons shall not testify in certain respects:

(B) A physician concerning a communication made to him by his patient in that relation or his advice to his patient but the physician may testify by express consent of the patient or if the patient be deceased by the express consent of the surviving spouse or the executor or administrator of the estate of such deceased patient or if the patient voluntarily testifies the physician may be compelled to testify on the same subject, or if the patient, his executor or administrator, files a medical claim, as defined in division (D) (3) of section 2305.11 of the Revised Code, such filing shall constitute a waiver of this privilege with regard to the care and treatment of which complaint is made. The provisions of this division apply to doctors of medicine, doctors of osteopathic medicine, and doctors of podiatric medicine.

Office-Supreme Court, U.S.
FILED
JUN 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1646

In the Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL MOTORS CORPORATION, PETITIONER

v.

DIRECTOR OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in enforcing a subpoena issued by the National Institute for Occupational Safety and Health to an employer for employee medical records in connection with a statutorily authorized investigation into the presence of toxic substances in the workplace, the court of appeals correctly determined that production of the records to NIOSH was not violative of the employees' constitutional right of privacy or barred by the physician-patient privilege under state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 636 F. 2d 163. The opinion of the district court (Pet. App. 7a-15a) is reported at 459 F. Supp. 235.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on December 30, 1980. The petition for a writ of certiorari was filed on March 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Institute for Occupational Safety and Health (NIOSH) was established by the Occupational Safety and Health Act of 1970, 29 U.S.C. 671. The Director of NIOSH is authorized to conduct various kinds of research into occupational safety and health matters. In

particular, following a written request by an employee representative, the Director "shall determine * * * whether any substance normally found in the place of employment has potentially toxic effects" upon the workers. 29 U.S.C. 669(a)(6). The Director is authorized to subpoena records in order to carry out these health hazard evaluations. 29 U.S.C. 669(b); see also 29 U.S.C. 657(b); 42 C.F.R. Part 85.

This case involves a health hazard investigation commenced in 1976 at petitioner's Hill Plant in Dayton, Ohio. The investigation was begun at the request of union representatives, who alleged that workers engaged in the plant's "wet rubber process" were suffering from rubber poisoning and other skin diseases. During the course of the investigation, NIOSH issued a subpoena duces tecum to petitioner for the production of the medical records of all employees involved in the wet rubber process. Each record included the results of the employee's pre-employment physical, annual precautionary examinations, and examinations required by the Occupational Safety and Health Act of 1970. Petitioner declined to comply with the subpoena unless individual employees authorized release of their records. A consent form was prepared by petitioner and circulated by company supervisors to employees whose medical records were covered by the subpoena. Of the 704 recipients, 490 employees failed to execute the consent form (Pet. App. 1a-2a, 8a; C.A. App. 65-66).

Petitioner subsequently filed this action in the United States District Court for the Southern District of Ohio, seeking a declaration that it was not required to produce to NIOSH the records of those employees who did not consent (Pet. App. 2a, 7a). After an evidentiary hearing, the district court found that "NIOSH maintains Health Hazard Evaluation records in locked cabinets and under reasonably

secure conditions," that "information [stored in a computer] regarding a specific employee would be difficult, if not impossible, to retrieve [by an unauthorized person]," and that "[n]o evidence was presented of any breach of security" (*id.* at 10a). In light of those findings, the court held that petitioner must produce the medical records of its Hill Plant employees regardless of their consent (*id.* at 13a-14a). However, apparently relying on the physician-patient privilege recognized by Ohio law, the court allowed petitioner to delete the names and addresses from the medical records of employees who had not given their consent (*id.* at 14a, 15a), and ruled that "[a]n employee is entitled to be heard in a due process hearing to determine whether or not identified records pertaining to him may be examined without his consent" (*id.* at 15a).

On cross-appeals, the court of appeals reversed in pertinent part and set aside the portion of the judgment adverse to NIOSH (Pet. App. 1a-6a). The court first rejected petitioner's contention "that the Ohio [physician-patient] privilege statute is * * * the controlling principle of law here" (*id.* at 3a). Rather, concluding that in a federal-question case "the applicability of a privilege must * * * be ascertained by reference to * * * [federal law]" (*id.* at 4a), the court declined to "expand the scope of the 'federal common law' " to establish a physician-patient privilege that historically "[t]he common law did not recognize" (*ibid.*).

In addition, relying on this Court's decision in *Whalen* v. *Roe*, 429 U.S. 589 (1977), the court of appeals held that full enforcement of the subpoena to require production of the requested records to NIOSH would not violate any constitutional right of privacy of the employees (Pet. App. 5a). The court specifically noted that "in the absence of individual identification, [NIOSH's] performance of its statutory duties would be hampered. It would be impossible for [NIOSH] investigators * * * [adequately to conduct the

health hazard evaluation if the] medical records * * * were anonymous" (*id.* at 4a). Finally, having "in mind" NIOSH's assurances that "there will be no public disclosure of the medical information pertaining to individual * * * employees" (*id.* at 6a), the court remanded the case to the district court "for formulation and implementation of security provisions that will ensure proper disposition of the subpoenaed records as outlined in this opinion" (*ibid.*).

ARGUMENT

Without contesting either the statutory authority of NIOSH to issue the subpoena in this case or the validity of the subpoena under traditional principles of administrative law, petitioner argues that production of the requested records to NIOSH is barred by the employees' constitutional right of privacy and the Ohio physician-patient privilege. By way of remedy, petitioner seeks to delete the employees' names and addresses from the records and to provide the files to NIOSH in an anonymous form.

Petitioner's objections are misplaced. Contrary to its contention (Pet. 14-17), every court to consider the constitutional claim raised by petitioner has concluded, in accordance with the decision below (Pet. App. 5a), that the issue is governed by this Court's decision in *Whalen* v. *Roe*, 429 U.S. 589 (1977). See *United States* v. *Westinghouse Electric Corp.*, 638 F. 2d 570, 577-580 (3d Cir. 1980); *United States* v. *Allis-Chalmers Corp.*, 498 F. Supp. 1027, 1029-1031 (E.D. Wis. 1980); *E.I. du Pont de Nemours & Co.* v. *Finklea*, 442 F. Supp. 821, 824-826 (S.D. W. Va. 1977).

In *Whalen* v. *Roe, supra*, the Court unanimously rejected the argument that a constitutional right of privacy in medical records rendered invalid a New York statute requiring that prescription forms for certain drugs be provided to the State with identification of the prescribing physician, the dispensing pharmacy, the drug and dosage, and the patient (including name, address, and age). In

reversing the lower court, which had struck down the statute on the ground that it was not justified by a "compelling" state interest (*Roe* v. *Ingraham*, 403 F. Supp. 931, 937 (S.D.N.Y. 1975) (three-judge court)), the Court explained (429 U.S. at 602; footnote omitted; emphasis added):

> Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, *disclosures of private medical information* to doctors, to hospital personnel, to insurance companies, and *to public health agencies are often an essential part of modern medical practice* even when the disclosure may reflect unfavorably on the character of the patient. *Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.*

The Court observed that the concept of a " 'zone of privacy' " in medical records subsumed "at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions" (429 U.S. at 598-600; footnotes omitted). The Court concluded that the New York statute did not infringe the first interest because the "statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in

privacy" (*id.* at 605) and there was "no support * * * for an assumption that the security provisions of the statute will be administered improperly" (*id.* at 601). Nor could "it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, * * * [on proper medical care]" (*id.* at 603). Accordingly, the Court sustained the constitutionality of the New York statute. See also *Schachter* v. *Whalen,* 581 F. 2d 35 (2d Cir. 1978) (subpoena to doctor for patients' medical records, in connection with a state investigation of medical misconduct involving laetrile, was enforceable in light of protections against public disclosure).

Under *Whalen* v. *Roe,* the court below correctly enforced NIOSH's subpoena in this case. It is even less likely here than in *Whalen* v. *Roe* that production of the medical records to the government would discourage people from seeking necessary medical care. The purpose of the health hazard evaluation is to protect employees from unhealthful conditions in the workplace, and the evaluation of petitioner's plant was requested (as is generally true for health hazard evaluations) by the employees' representative (Pet. App. 1a); in contrast, the statute in *Whalen* v. *Roe* was designed to police the illicit use of dangerous drugs and was directed in large measure to criminal prosecution of drug offenders. Moreover, petitioner's employees generally have no choice to decline the medical examinations reflected in the requested records, since for the most part they are made mandatory by petitioner (C.A. App. 55-57). And a large number of people within petitioner's organization already have routine access to these medical records (Pet. 4 n.5; C.A. App. 61-63). Finally, NIOSH undertakes extensive security measures to protect the confidentiality of the materials obtained in connection with health hazard evaluations (Pet. App. 6a, 10a; see also 45 C.F.R. 5.71(a)), and there is

no basis to doubt the adequacy of those measures to prevent unauthorized public disclosure.[1]

Contrary to petitioner's argument (Pet. 7-12), the decision below does not conflict with the ruling of the Third Circuit in *United States* v. *Westinghouse Electric Corp., supra*. In that case, Westinghouse resisted a NIOSH subpoena principally on the ground that not all of the information in the medical files of its employees was relevant and that, "at most, NIOSH is entitled to examination of excerpts of those records which contain reports of * * * [specific tests]" (638 F. 2d at 575). The court of appeals rejected this claim and, relying on *Whalen* v. *Roe*, upheld the subpoena because "the interest in occupational safety and health * * * is substantial," there is "a reasonable need [by NIOSH] for the entire medical file of the employees as requested * * * in [its] complete form," the "information which the medical records contain is [not] of such a high degree of sensitivity that the intrusion could be considered severe or that the employees are likely to suffer any adverse effects from disclosure to NIOSH personnel," and " 'NIOSH's procedures of safekeeping the records and of removing the names and addresses of the individuals in its compilation of published data represent[] sufficiently adequate assurance of non-disclosure by' [NIOSH]" (638 F. 2d at 579-580). Thus, the Third Circuit held that the employees' medical records must be produced to NIOSH at least to the extent they contain "routine testing, such as X-rays, blood tests, pulmonary function tests, hearing and visual tests" (638 F. 2d at 579), and that the records provided to NIOSH

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[1] In addition, the court of appeals has remanded the case to the district court to formulate and implement such security provisions as may be necessary to ensure the proper disposition of the subpoenaed records (Pet. App. 6a). Any concerns petitioner might have about the adequacy of NIOSH's procedures can be raised before the district court, and thus further review of this aspect of the case would be premature at the present time.

could not be redacted to remove the identities of individual employees (638 F. 2d at 580). In these respects the decision of the Third Circuit in *Westinghouse* is in full accord with the decision of the court of appeals in the present case.[2]

It is true that the Third Circuit in *Westinghouse* further recognized that, while

> the public need prevailed over the claim that medical records in general were protected from discovery[,] * * * there may be information in a particular file which an employee may consider highly sensitive. * * * [T]he files are not limited to employment-related concerns but include records of the employees' personal consultations with the company physician and the physician's ministrations on a broad spectrum of health matters. * * * [E]mployees * * * may have raised with the company physician medical matters unrelated to their employment which they consider highly confidential.

638 F. 2d at 580-581. To accommodate this interest, the Third Circuit concluded that "the most appropriate procedure is to require NIOSH to give prior notice to the employees whose medical records it seeks to examine and to

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[2]Indeed, the Third Circuit in *Westinghouse* expressly rejected (638 F. 2d at 581) the decision of the district court in this case, which was later reversed by the court below, that disclosure could not be made to NIOSH except upon the employees' written consent. As the Third Circuit explained (*ibid.*):

> We believe that the requirement of securing written consent may impose too great an impediment to NIOSH's ability to carry out its statutory mandate. * * * [T]here may be * * * instances where the number of employees involved makes securing written consent difficult. Futhermore, there is the possibility that some employees will withhold consent either arbitrarily or because they do not understand the full nature of the investigation. Finally, some employees may withhold consent because they believe that is the course desired by their employer.

permit the employees to raise a personal claim of privacy, if they desire. * * * [Following that procedure,] the district court can balance the competing interests before ordering disclosure of the materials [to NIOSH] * * *" (638 F. 2d at 581-582).[3]

This aspect of *Westinghouse* is not in conflict with the decision below. Unlike Westinghouse, petitioner at no time distinguished among the types of information in the medical records or urged that greater protections were due certain portions of the records. Instead, petitioner has focused its arguments on the identification of employees in the subpoenaed records and has sought a blanket privilege against production of the records in the absence of written consent by each individual employee. Thus, the court of appeals in this case was never called upon to consider the distinct issue of the appropriateness of the procedures established by the Third Circuit to address the specific problem of "medical matters [of employees] unrelated to their employment which they consider highly confidential" (638 F. 2d at 581), and its decision here does not foreclose consideration of that issue in the future.[4]

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[3]Notwithstanding petitioner's suggestions (Pet. 9, 10 & n.14, 12), the Third Circuit did not require that the district court conduct a full due process hearing on any objections raised by the employees. On the contrary, the court of appeals specifically ordered "prompt disposition [of such claims] so that NIOSH's evaluation is not hampered" (638 F. 2d at 582). See also page 8 note 2, *supra*.

[4]The significance of the Third Circuit's directive is also unclear at this time. First, implementation of *Westinghouse* is now in progress, and it is uncertain how burdensome to NIOSH or beneficial to the employees those procedures will prove to be in practice. Second, the notice required of NIOSH by the Third Circuit could be given voluntarily by the employer whose records are subpoenaed; in that situation the *Westinghouse* procedures might be of little practical importance (and, as noted above, the Sixth Circuit's decision in the present case would not preclude employees from raising an individualized privacy interest in specific items in their files). For these reasons, we believe that the

Finally, contrary to petitioner's contention (Pet. 17-22), enforcement of the subpoena in this case is not barred by the Ohio physician-patient privilege. As the court below correctly held (Pet. App. 3a-4a), the applicability of a privilege in a federal-question case is governed under Fed. R. Evid. 501 by federal rather than state law. See, *e.g.*, *Heathman* v. *United States District Court*, 503 F. 2d 1032 (9th Cir. 1974); *United States* v. *Balistrieri*, 403 F. 2d 472 (7th Cir. 1968); *Colton* v. *United States*, 306 F. 2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* 501-20 n.2, 501-33 to 501-34 (Cum. Supp. 1980).[5]

The physician-patient privilege was unknown to the common law. See *Whalen* v. *Roe*, *supra*, 429 U.S. at 602 n.28. Indeed, even the now-superseded version of the Federal Rules of Evidence promulgated by this Court[6] did not contain a physician-patient privilege. See Proposed Fed. R. Evid. 501-513, 56 F.R.D. 183, 230-261 (1973); 2 J. Weinstein & M. Berger, *supra*, at 501-16 to 501-17, 504-3, 504-8 to 504-9. In these circumstances, the court of appeals properly declined to "expand the scope of the 'federal common law' " (Pet. App. 4a). See also, *e.g.*, *FTC* v. *St. Regis Paper Co.*, 304 F. 2d 731 (7th Cir. 1962) (refusal to adopt federal accountant-client privilege that did not exist at common law but was created by state law).[7]

Court should await further developments in the lower courts before determining whether the issues presented by petitioner are otherwise appropriate for review.

[5]On the other hand, in civil actions where state law provides the substantive rule of decision, the state law of privilege is to be applied in federal court. Fed. R. Evid. 501. This provision is inapposite in federal-question cases such as the present one, and petitioner errs in relying (Pet. 19-20) on this doctrine to support its position here.

[6]See *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

[7]In any event, as petitioner acknowledges (Pet. 18), "federal law will of course override otherwise applicable state law where necessary to attain the ends sought by federal law." Here, application of Ohio law to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

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delete individual identifiers in the requested medical records would "hamper[]" NIOSH's "performance of its statutory duties" and make "impossible" the conduct of a proper health hazard evaluation (Pet. App. 4a). Accordingly, it would be entirely unwarranted to apply the Ohio physician-patient privilege to deny full enforcement of the subpoena in this case.

DOJ-1981-06